83-846

Office-Supreme Court, U.S.
FILED
DEC 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 83

In The

Supreme Court Of The United States

OCTOBER TERM, 1983

STATE OF CONNECTICUT
Petitioner

v.

NEIL J. THOMPSON, JAMES C. BLACK, FRANK P. LEPORE, ROBERT E. PARKER, JR.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

MAXWELL HEIMAN
43 Bellevue Avenue
P.O. Box 1557
Bristol, CT 06010
(203) 589-4343
Counsel of Record
for Respondent,
Robert E. Parker, Jr.

Of Counsel:
WILLIAM J. TRACY, JR.
Furey, Donovan & Heiman, P.C.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... i

STATEMENT OF THE CASE.....ii

REASONS FOR DENIAL OF CERTIORARI.... 3

CONCLUSION..... 9

TABLE OF AUTHORITIES

Page

(1) Cases

Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965)..... 4

Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1965)..... 5

Klinger v. Missouri, 80 U.S. 257 (1872)..... 5

State v. Grant, 176 Conn. 17 (1978)..... 6

State v. Thompson, 191 Conn. 360 (1983)..... 5

Page

(2) Statutes

28 U.S.C., Section 1257 (3)..... 3

STATEMENT OF THE CASE

On March 9, 1973, the state's attorneys for the Judicial Districts of Litchfield and of Waterbury applied, pursuant to Connecticut General Statutes, Section 54-41a, et seq., for authority to intercept wire communications of Arnold "Tuffy" Albert and others. On March 15, 1973, a panel of judges of the Superior Court authorized the interception of wire communications of Arnold "Tuffy" Albert over two public telephones. The authorization contained a minimization order.

Using information gained from the interceptions, the state's attorney for the Judicial District of Hartford-New Britain applied for authority to intercept communications of Daniel A. Wrisley a/k/a Daniel A. Risley and

others. The panel of judges authorized the interception of wire communications of Daniel A. Risley. The authorization contained a minimization order.

On May 4, 1973, Robert E. Parker Jr. was charged by the State of Connecticut with the crime of conspiring to distribute, compound, transport with the intent to sell, and dispense a narcotic substance, in violation of Connecticut General Statutes, Section 53a-48. Robert E. Parker, Jr., entered a plea of not guilty and elected to be tried by a jury.

The defendant, Robert E. Parker, filed a Motion to Suppress the contents of intercepted wire communications and evidence obtained therefrom. The motion was granted by the Superior Court on September 6, 1974.

The defendant, Robert E. Parker, then filed a Motion to Dismiss which was granted. Judgment of dismissal was entered by the Superior Court on July 28, 1976.

The State of Connecticut appealed from the judgment to the Supreme Court of the State of Connecticut. The Supreme Court of Connecticut affirmed the judgment. The decision of the Supreme Court of Connecticut is reported in at 191 Conn. 360, 464 A.2d. 799 (1983).

REASONS FOR DENIAL OF CERTIORARI

(1) THE SUPREME COURT LACK JURISDICTION UNDER 28 U.S.C. SECTION 1257(3).

> "Final judgments or decrees rendered by the highest court of a state...may be reviewed...:

> (3) By writ of certiorari, where the validity of a State Statute is drawn in question on the ground of its being repugnant to the Constitution...of the United States, or where title, right, privilege or immunity is specially set up or claimed under the Constitution...of...the United States" 28 U.S.C. Section 1257.

The party seeking review bears the burden of establishing that jurisdiction in this Court exists. Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 197 (1965).

Although the constitutionality of the state wiretap statute was questioned by the defendants in the trial court, the issue was resolved in favor of the State and was not presented to the Connecticut Supreme Court. Therefore, since the Connecticut Supreme Court did not consider or decide the question, it is not available as a basis of jurisdiction in this court.

The decision of the Connecticut Supreme Court does not rest upon the assertion of any "...title, right, privilege or immunity..." claimed under the Constitution of the United States. Rather, the decision of the Connecticut Supreme Court has an adequate and independent basis in substantive and procedural state law precluding jurisdiction in this court. Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1965). Klinger v. Missouri, 80 U.S. 257 (1872).

The Connecticut Supreme Court fashioned a remedy of suppression, not as a matter of federal constitutional law, but to "ensure to integrity of the wiretap statute and of the functioning of the judiciary with respect to it." State v. Thompson, 191 Conn., 360, 383 (1983) (Petitioner's Appendix A at 23a). One important consideration upon

which the remedy was based was the Connecticut Court's "reluctance to accept as evidence in the courts of this state materials obtained in disregard of a [Connecticut] court order." Id. at 382 (Appendix at 22a). The remedy was fashioned because of the state had "violated the minimization mandate of the [Connecticut] wiretap statute and of orders 73-03 and 73-04 [of the Connecticut Superior Court]." Id. at 372 (Appendix A at 12a). Finally, the Connecticut Supreme Court expressly "recognized that...[the Connecticut] wiretap statute is in many ways more straight then the federal act." citing State v. Grant, 176 Conn. 17, 25, 25n.3 (1978) and the Connecticut Legislative history. Id. at 371. (Appendix A at 11a). In both Grant and Thompson, the Connecticut Supreme Court used federal authority

merely as guidance and not as controlling its determination of the appropriate state suppression standard. State v. Grant, supra at 25, State v. Thompson, supra at 371, 380-384. (Appendix A at 11a, 20a-23a).

The state, in its petition, has questioned only the remedy fashioned by the Connecticut Supreme Court. The Connecticut Supreme Court fashioned the remedy as a matter of state, rather than federal, law.

(2) THE RECORD AND CIRCUMSTANCES OF THE CASE SUPPORT THE REMEDY APPLIED BY THE CONNECTICUT SUPREME COURT.

The remedy of suppression was tailored by the Connecticut Court to meet the circumstances of the case. State v. Thompson, supra at 383-84 (Appendix A at 23a). The court had

determined that the officers executing the wiretap "entirely misconstrued the scope of the order..." and "completely disregarded the minimization requirement contained in that warrant..." issued by the panel of judges. Id.

> "The trial court found that surveillance pursuant to the authorized wiretaps took the form of indiscriminate listening to all communications on the tapped telephones. Consequently, with the exception of a single call involving a doctor, every call made over the tapped telephones, the public telephones under order 73-03 and the private telephone under order 73-04, was over heard and recorded in full. all calls were summarized in written logs maintained by the monitoring officers." Id. at 366-67 (Appendix A at 6a-7a).

Furthermore, the record suggested that a call involving a dentist had been intercepted and recorded in full and that, although one officer indicated that he had shut off the recording device on a call involving a doctor and

two involving attorneys, his log revealed only one shut-down. Finally, the Connecticut Supreme Court indicate that the "trial court was not bound to credit the state's conclusory claim that only a small percentage of innocent calls exceeded two minutes in length". Id. at 374 (Appendix A at 14a).

> "Because of the conjunction of these factors, the remedy of total suppression...was entirely appropriate." Id at 384 (Appendix A at 23a).

CONCLUSION

For the foregoing reasons, this Court should find that it lacks jurisdiction to consider the case and that no question worthy of full review is presented and should not issue a writ of certiorari to the Supreme Court of Connecticut.

Respondent, Robert E. Parker, Jr.
Maxwell Heiman
43 Bellevue Avenue
Bristol, CT 06010
(203) 589-4343
Counsel of Record for Respondent

OF COUNSEL
William J. Tracy, Jr.
Furey, Donovan & Heiman, P.C.